SUPREME COURT OF THE UNITED STATES.

No. 287.

RICHARD MASON, PLAINTIFF,

vs.

ANSON ELDRED, ELISHA ELDRED AND URI BALCOM.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee in the said district of Wisconsin, this first day of November, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the ninetieth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America, for the ninth circuit and district of Wisconsin, begun and held according to law on the second Monday of September, A. D. 1865, at the city of Milwaukee in said district of Wisconsin—present and presiding Hon. Samuel F. Miller, associate justice of the Supreme Court of the U. S. assigned to said circuit, and the Hon. Andrew G. Miller, district judge—on the eleventh day of the term, to wit, on the twenty-second day of September, A. D. 1865, the following proceedings were had, to wit:

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI BALCOM.

Be it remembered, that heretofore, to wit, on the eighth day of June, A. D. 1864, the plaintiff filed in the office of the clerk of this court his præcipe for a summons against the above-named defendants in the words and figures following, to wit:

CIRCUIT COURT U. S., *Dist. Wisconsin:*

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI BALCOM.

Please issue a summons in the above-entitled cause and make the same returnable according to law, in an action of trespass on the case upon promises; damages $2,000. Yours, &c.,

W. I. BUTLER, *Pl'ffs att'y.*

Whereupon a summons issued in the words and figures following, to wit:

2 THE UNITED STATES OF AMERICA, *s:*

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon Anson Eldred, Elisha Eldred and Uri Balcom to appear before the circuit court of the United

State of America for the district of Wisconsin, in the ninth circuit, at the United States court-room, in the city of Milwaukee, on the first Monday of July next ensuing, then and there to answer unto Richard Mason in a plea of trespass, on the case on promises, to his damage two thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee in the said district, this eighth day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-eighth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

W. I. BUTLER, *Attorney.*

And afterwards, on the 20th day of June, 1864, came the marshal and made return of the summons herein, endorsed thereon as follows, to wit:

"Served on the within-named Anson Eldred by showing him this summons and delivering him a copy thereof, this 13th day of June, 1864.

"D. C. JACKSON, *Marshal,*
"By W. S. JACKSON, *Deputy.*

"Fees, $2 26."

And afterwards, on the first day of July, 1864, came the plaintiff, by his attorney, and filed his declaration in the words and figures following, to wit:

3 *Declaration.*

Circuit court of the United States for the district of Wisconsin, of the second Monday of September, A. D. 1864.

DISTRICT OF WISCONSIN, *ss:*

Richard Mason, who is citizen of the State of Illinois, plaintiff in this suit, by W. I. Butler, his attorney, complains of Anson Eldred, Uri Balcom and Elisha Eldred, defendants in this suit, who at the time of the contracting of the obligations and indebtedness hereinafter mentioned were copartners in trade under the style and firm of Eldreds & Balcom, and who are citizen of the State of Wisconsin, of a plea of trespass on the case upon promises. For that whereas the said defendants, on the first day of June, in the year one thousand eight hundred and sixty-four, at the said district of Wisconsin, were indebted to the said plaintiff in the sum of two thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed in and about the business of the said defendants, and for the said defendants, and at the special instance and request of the said defendants, and also for divers materials and other necessary things by the said plaintiff found, provided, used, and applied in and about that work, at the special instance and request of the said defendants; and being so indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to

wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, done, performed, and bestowed divers other work and labor, care and diligence in and about the business of the said defendants, and for the said defendants, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendants for the same, when the said defendants should be thereunto afterwards requested; and the said plaintiff aver that the said plaintiff therefore reasonably deserve to have of the said defendants for the same the further sum of two thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to the said plaintiff in the sum of two thousand dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendants, and at the like request of the said defendants, and in the further sum of two thousand dollars of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendants, and at the like request of the said defendants, and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and at the request of the said defendants, and for other money by the said defendants before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers others sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there found to be in arrear and indebted to the said plaintiff in the further sum of two thousand dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the

place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned. when the said defendants should be thereunto afterwards requested. Nevertheless the said defendants, although often requested, &c., have not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused. and still do refuse, to the damage of the said plaintiff of two thousand dollars; and therefore the said plaintiff brings suit, &c.

W. I. BUTLER, *Plaintiff's Attorney.*

4 To the within defendant:

Take notice that the following is a copy of a promissory note which will be offered in evidence on the trial of this cause under the money counts in the within declaration contained. Yours, &c.,

W. I. BUTLER, *Plaintiff's Attorney.*

(Copy.)

"$930 98. CHICAGO, June 1st, 1861.

"Sixty days after date we promise to pay to the order of Richard Mason, esq., nine hundred thirty and $\frac{98}{100}$ dollars at Marine Bank, in par funds, value received.

"(Signed) ELDREDS & BALCOM."

5 And afterwards, on the 15th day of September, 1864, came the defendant, Anson Eldred, by his attorneys, and filed his plea, in the words and figures following, to wit:

U. S. circuit court, district of Wisconsin.

ANSON ELDRED, impleaded, &c., *ads.* RICHARD MASON.

And now comes the said defendant, Anson Eldred, by Cary & Pratt, his attorneys, and defends the wrong and injury, when, &c., and says that said defendants did not undertake or promise, in manner and form as the said plaintiff hath above thereof complained against them; and of this said defendant puts himself upon the country, &c.

CARY & PRATT, *Att'y for Def't.*

And afterwards, on the 29th day of November, 1864, came the plaintiff, by his attorney, and filed his replication, in the words and figures following, to wit:

U. S. circuit court, district of Wisconsin.

RICHARD MASON *vs.* ANSON ELDRED *et al.*

And the said plaintiff, as to the plea of the said defendant, Anson Eldred, whereof he hath put himself upon the country, doth the like.

W. I. BUTLER, *Pl'ff's Att'y.*

6 January 3, 1865.—This day came the parties, by their counsel, and by consent, it is ordered by the court that this cause be, and the same hereby is, continued.

September 22, 1865.—This day came the parties, by their counsel, and the issue herein came on to be tried, whereupon a jury was called to try the same, who came, to wit: A. Armstrong, Levi Morse, Amos C. Leland, Ira Brickley, Enos McKenzie, Gilbert C. Forsyth, Isaac Neustadtt, George P. Sherman, Thomas Sugden, James Campbell, Israel Stebbins, and John Comstock, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled, when, on a certificate of division of opinion between the judges as herein filed, the said jury was discharged.

September 27, 1865.—This day came the parties, by their counsel, and presented to the court a statement of the case and certificate of division of opinion between the judges, duly signed and filed herein, as follows, to wit:

UNITED STATES OF AMERICA, *District of Wisconsin:*

At a circuit court of the United States begun and at Milwaukee, for the district of Wisconsin, on the second Monday of September, A. D. 1865, at the September term of said court, to wit, on the 22d day of September, A. D. 1865—

Present: The Hon. Samuel F. Miller and the Hon. Andrew G. Miller, judges.

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI BALCOM.

This is an action of assumpsit on a note, a copy of which is as follows, to wit:

$930 98 CHICAGO, *June 1st*, 1861.

Sixty days after date we promise to pay to the order of Richard Mason, esq., nine hundred and thirty and $\frac{98}{100}$ dollars at Marine Bank, in par funds, value received.

(Signed) ELDREDS & BALCOM.

7 The declaration stated the defendants to be copartners, under the name, style, and firm of Eldreds & Balcom. The defendant, Anson Eldred, who alone was served with process, interposed the plea of *non assumpsit*, on which issue was taken, and upon that issue the action came on to be tried before a jury duly empanneled and sworn. Whereupon the said note was read in evidence without objection, and the plaintiff rested; and thereupon the defendant, Anson Eldred, by his counsel, offered in evidence to maintain the issue on his part, on alleged exemplification of a record, in the words and figures following, to wit:

State of Michigan.—In the circuit court for the county of Wayne.

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI BALCOM.

Pleas of the circuit court for the county of Wayne, at the court-

house in the city of Detroit, county of Wayne, State of Michigan, on the twelfth day of December, A. D. one thousand eight hundred and sixty-two.

Present: Hon. B. F. H. Witherell, circuit judge.

WAYNE COUNTY, *to wit:*

Richard Mason, plaintiff in this suit, put in his place Alfred Russell, his attorney, to prosecute this suit against Anson Eldred, Elisha Eldred and Uri Balcom, defendants in an action of assumpsit.

WAYNE COUNTY, *to wit:*

Elisha Eldred, defendant in this suit, put in their place C. I. Walker, their attorney, at the suit of the said plaintiff, in the plea aforesaid.

WAYNE COUNTY, *to wit:*

Be it remembered, that heretofore, to wit, at Detroit, in the county and State aforesaid, and on the nineteenth day of April, in the year of our Lord one thousand eight hundred and sixty-two, according to the form of the statute in such case made and provided, the said
8 plaintiff, by his said attorney, filed in the office of the clerk of said court aforesaid, a certain declaration against the said defendants, which said declaration is in the words and figures following, together with the endorsement thereon, to wit:

In the circuit court for the county of Wayne.

STATE OF MICHIGAN, *County of Wayne, ss:*

Richard Mason, plantiff herein, by Alfred Russell, his attorney, complains of Anson Eldred, Elisha Eldred and Uri Balcom, partners in business, under the firm name of Eldreds & Balcom, defendants herein, of a plea of trespass on the case upon promises, filing this declaration as commencement of suit:

For that whereas the defendants, on the sixteenth day of April, A. D. 1862, at Chicago, to wit, in the said county of Wayne, were indebted to the plaintiff in the sum of five thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendants, at their request; and in a like sum for the price and value of work then and there done, and materials for the same provided, by the plaintiff for the defendants, at their request; and in like sum for money then and there lent by the plaintiff to the defendants, at their request; and in a like sum for money then and there paid by the plaintiff for the defendants, at their request; and in a like sum of money then and there received by the defendants for the use of the plaintiff; and in a like sum for money then and there found to be due from the defendants to the plaintiff on an account stated between them; and thereupon the said defendants afterwards, and on the day and year aforesaid, in consideration of the premises, respectively, then and there promised the plaintiff to pay him the said several sums of money, respectively, on request; yet the said defendants have disregarded their said promises, and have not (although

often requested so to do) paid any of the said sums of money, or any part thereof, to the plaintiff's damage of five thousand dollars; and therefore he brings suit, &c.

(Signed) ALFRED RUSSELL, *Plaintiff's Attorney.*

To the above-named defendants: Take notice, that on the trial
9 of the above cause the plaintiff, under the money counts, will give in evidence a certain promissory note, a copy of which is given below.

(Signed) ALFRED RUSSELL, *Plaintiff's Attorney.*

$930 98. CHICAGO, *June* 1, 1861.

Sixty days after date we promise to pay to the order of Richard Mason, esq'r, nine hundred thirty $\frac{98}{100}$ dollars, Marine Bank, in par funds, value received.

(Signed) ELDREDS & BALCOM.

Declaration endorsed as follows: "No. 10,937, circuit court, county of Wayne. Richard Mason *vs.* Anson Eldred, Elisha Eldred and Uri Balcom. Narr. Alfred Russell, plaintiff's attorney. Filed April 19, 1862. (Signed) D. Walker, clerk."

WAYNE COUNTY, *to wit*:

And afterwards, on the 19th day of April, A. D. 1862, the said plaintiff, by his said attorney, entered in the common rule-book kept by the said clerk of said court in his office a rule to plead, which said rule to plead is in the following words and figures, to wit:

APRIL 19, 1862.

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI Balcom.

On filing declaration in this cause as commencement of suit, and on motion of Alfred Russell, attorney for plaintiff, it is ordered that said defendants appear and plead to said declaration within twenty days after service on them of a copy thereof, and notice of this rule or judgment, &c.

ALFRED RUSSELL, *Pl'ffs Att'y.*

WAYNE COUNTY, *to wit:*

And afterwards, on the 23d day of April, A. D. 1862, the said plaintiff, by his said attorney, filed in the office of said clerk of said court proof of service of declaration, and the which said proof of service of declaration, and the endorsement thereon, are in the following words and figures, to wit:

In the circuit court for the county of Wayne.

10 STATE OF MICHIGAN, *County of Wayne, ss*:

Richard Mason, plaintiff herein, by Alfred Russell, his attorney, complains of Anson Eldred, Elisha Eldred and Uri Balcom, part-

ners in business, under the firm name of Eldreds & Balcom, defendants herein, of a plea of trespass on the case upon promises, filing this declaration as commencement of suit:

For that whereas the defendants, on the sixteenth day of April, A. D. 1862, at Chicago, to wit, in said county of Wayne, were indebted to the plaintiff in the sum of five thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at their request;

And in a like sum for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendants, at their request;

And in a like sum for money then and there lent by the plaintiff to the defendants, at their request;

And in a like sum for money then and there paid by the plaintiff for the defendants, at their request;

And in a like sum of money then and there received by the defendants for the use of the plaintiff;

And in a like sum of money then and there found to be due from the defendants to the plaintiff on an account stated between them;

And thereupon the said defendants afterwards, and on the day and year aforesaid, in consideration of the premises, respectively, then and there promised the plaintiff to pay him the said several sums of money, respectively, on request; yet the said defendants have disregarded their said promises, and have not (although often requested so to do) paid any of the said sums of money, or any part thereof, to the plaintiff's damage five thousand dollars; and therefore he brings suit, &c.

(Signed) ALFRED RUSSELL, *Plaintiff's Attorney.*

To the above-named defendants: Take notice, that on the trial of the above cause, the plaintiff, under the money counts, will give in evidence a certain promissory note, a copy of which is given below.

(Signed) ALFRED RUSSELL, *Plaintiff's Attorney.*

$930 98. CHICAGO, *June 1st*, 1861.

11 Sixty days after date, we promise to pay to the order of Richard Mason, esq., nine hundred thirty $\frac{89}{100}$ dollars, at Marine Bank, in par funds, value received.

(Signed) ELDREDS & BALCOM.

STATE OF MICHIGAN, *County of Wayne, ss:*

I hereby certify and return that on the 19 day of April, 1862, I served the declaration of which the within is a copy on Elisha Eldred, one of the defendants named in said declaration, by delivering to said defendant, in said county of Wayne, a true copy thereof, and of the foregoing note, and the notice relating thereto, together with a true copy of the notice to appear and plead, endorsed thereon as is hereon endorsed.

Fees $\frac{98}{100}$. (Signed) MARK FLANIGAN, *Sheriff.*
By L. P. DURKEE, *Dep. Sheriff.*

Declaration endorsed: No. 10,937. Circuit court, county of Wayne. Richard Mason *vs.* Anson Eldred, Elisha Eldred and Uri Balcom. Copy. Narr.

To the within-named defendants: Take notice, that on filing a declaration in this cause, (of which the within is a true copy,) as commencement of suit, a rule was entered in a book of common rules kept by the clerk of said court, in his office in the city of Detroit, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof, and notice of said rule or judgment, &c. Yours, &c.,

ALFRED RUSSELL, *Plaintiff's Attorney.*

Detroit, April 19th, 1862.

Filed April 23d, 1862.

(Signed) W. H. REXFORD, *Dep. Cl'k.*

And afterwards, on the 11th day of December, A. D. 1862, the said defendant, Elisha Eldred, by his said attorney, filed in the office of said clerk of said court his withdrawal of plea heretofore pleaded in this cause, which said plea and the endorsement thereon are in the words and figures following, to wit:

Circuit court for Wayne county.

RICHRAD MASON
vs.
ELISHA ELDRED, impleaded with ANSON ELdred and Uri Balcom.

The defendant, by C. I. Walker, his attorney, comes now here freely into court, and withdraws his plea in this cause, by him heretofore pleaded. Dated Dec. 11.

(Signed) C. I. WALKER, *Def'ts Att'y.*

12 Wayne circuit court.

Richard Mason *vs.* Elisha Eldred, impleaded with Anson Eldred and Uri Balcom.

Filed Dec. 11, 1862. D. WALKER, *Clerk.*

WAYNE COUNTY, *to wit:*

There appears in the files in this cause a plea of the defendant, Elisha Eldred, which has no mark of filing thereon, which said plea and the endorsement thereon are in the following words and figures, to wit:

In the circuit court for the county of Wayne.

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI Balcom.

And the said defendant, Elisha Eldred, by C. I. Walker, his attor-

ney, comes and demands a trial of the matters set forth in pl'ff's declaration.

C. I. WALKER, *Att'y for Elisha Eldred.*

To ALFRED RUSSELL, Esq., *Pl'ff's Att'y.*
Dated April 26, 1862.

Wayne circuit. Richard Mason *vs.* Anson Eldred *et al.* Plea of general issue.

C. I. WALKER, *Def't's Att'y.*

And now at this day, that is to say, at a session of the circuit court for the county of Wayne held at the court-house, in the city of Detroit, on the twelfth day of December, in the year one thousand eight hundred and sixty-two—Present: Hon. B. F. H. Witherell, circuit judge.

RICHARD MASON
vs.
ANSON ELDRED, ELISHA ELDRED and URI Balcom.

The defendants in this cause having, after notice of trial given, and during the present term of this court, withdrawn their plea by them heretofore pleaded, and the damages of the said plaintiff on the occasion of the premises having been duly assessed at the sum of ten hundred and nineteen dollars and sixty-eight cents, over and above his costs and charges by him about his suit in this behalf expended, thereupon it is considered that the said plaintiff do recover against the said defendants their damages aforesaid, together with
13 their costs and charges aforesaid to be taxed, and that the said plaintiff have execution thereof.

STATE OF MICHIGAN, *County of Wayne, ss:*

I, Jared Patchin, clerk of the circuit court for the county of Wayne, do hereby certify that the foregoing is correctly taken and copied from the record of the proceedings of said court in said cause, and that the same has been examined and compared by me with the original of said record in this cause, and that it is a correct transcript therefrom, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, this sixth day of March, in the year one thousand eight hundred and sixty-three.

[SEAL.] JARED PATCHIN, *Clerk.*

STATE OF MICHIGAN, *Wayne county, ss:*

I, Benj. F. H. Witherell, sole judge of the circuit court for the county of Wayne, being in the third judicial circuit for the State of Michigan, do hereby certify that the foregoing attestation of record is in due form and according to law, and that I am well acquainted with the handwriting of Jared Patchin, clerk of said court, and that the signature of the said clerk signed to said attestation of record is in his proper handwriting, and is his genuine signature, and that

he is the clerk of said court, and that said court is a court of record, and that the seal affixed to said attestation of record is the seal of the said circuit court.

In witness whereof, I have hereto set my hand this sixth day of March, 1863.

B. F. H. WETHERELL,
Circuit Judge for the County of Wayne, being in the Third Judicial Circuit for the State of Michigan.

14 Whereupon the plaintiff, by his counsel, objected to the reading of the same in evidence, because the said supposed exemplification of record was not admissible under the pleadings, and because it appeared upon the face thereof that there was no judgment against either of the defendants therein named except Elisha Eldred, who alone, as appears by the same, was served with process, or appeared in the case; and because said exemplification was insufficient to bar the plaintiff's action; and it was insisted by the counsel for said defendant, Anson Eldred, that the said supposed exemplification of record ought to be received and read in evidence in bar of the plaintiff's action, for the reason that said supposed exemplification showed a former recovery on said note, and a merger of said note in such recovery; and the case coming on to be argued at this term, it occurred as a question whether said supposed exemplification of record ought to be received and read in evidence in this action under the issue aforesaid, in bar of and to defeat a recovery by the said plaintiff against the said defendant, Anson Eldred; on which question the opinions of the judges were opposed.

Whereupon, on motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated, under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing state of the pleadings and statement of facts, which is made under the direction of the judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided; and the same is done accordingly in open court, at said term, to wit, on the said 22d day of Sept., 1865.

SAM. F. MILLER. [SEAL.]
A. G. MILLER. [SEAL.]

Endorsed: "Filed Sept. 27, 1865."

Filed November 6, 1865.

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